Supreme Court, U.S.
FILED
DEC 9 1996
CLERK

(2)

No. 96-729

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANITA L. BOWDEN,

Petitioner,

v.

PUBLIC BUILDING COMMISSION OF CHICAGO,

Respondent.

On Petition for Writ of Certiorari to the Illinois Appellate Court, First District

RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT

I.

This Case Is Not Properly Before The United States Supreme Court Pursuant To U.S. Supreme Court Rule 10

This case is not properly before the United States Supreme Court. U.S. Supreme Court Rule 10 clearly states the character of reasons used to determine the reviewability of a decision by a state court. The U.S. Supreme Court will only review these decisions when:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. U.S. SUP.CT. R.10

The petition does not present questions of constitutional rights and discrimination. A close examination beyond the first page of said petition reveals no support for those questions in the form of case law or argument. The petitioner merely sets out those questions at the beginning and fails to address them anywhere in the petition.

The petition does not present an important federal question nor does it present a conflict between the Illi-

nois appellate opinion in this case and any opinions of the U.S. Supreme Court, U.S. appellate courts or any other state courts of last resort regarding any federal question, "important" or otherwise.

The petition does attempt, however, to have this Court reinterpret the facts of this case under a new position or theory being presented for the first time at this level of appeal. This kind of review, is that in which this Court has refused to engage.

The plaintiff-petitioner argued the "continuing tort" theory at the trial court level to oppose the defendant-respondent's motion for summary judgment. The defendant-respondent relied on the discovery rule which the plaintiff argued was inapplicable to this case. The plaintiff-petitioner presented the same continuing tort theory arguments at the Illinois Appellate Court level. The Illinois Appellate Court affirmed the trial court decision.

The plaintiff-petitioner tried to recreate her argument in her petition to the Illinois Supreme Court arguing for the first time that the "discovery rule" was now applicable in favor of the plaintiff-petitioner and that the trial court misinterpreted the facts. The Illinois Supreme Court denied certiorari and the petitioner now seeks to present this new argument.

Since 1925, this Court has expressly refused to grant certiorari to review evidence and discuss specific facts. U.S. SUP.CT. R. 10; *Edward Hines Yellow Pine Trustees v. Martin*, 268 U.S. 458, 45 S.Ct. 543 (1925); *U.S. v. Johnston*, 268 U.S. 220, 45 S.Ct. 496 (1925); *See also Texas v. Mead*, 465 U.S. 1041, 104 S.Ct. 1318 (cert. den. 1984) (reaffirming the Court's position on the standard of review). However, this petitioner seeks to have this

Court do precisely that. The petitioner merely wishes to have this court question the trial court's interpretation of the evidence, an interpretation which the petitioner has not disputed until this highest level of appeal. Petitioner admits in paragraphs 2 and 3 of her statement of the case that she is presenting new arguments not presented to the lower courts. Since this Court has expressly refused to engage in this kind of review, the petition for writ of certiorari must be denied.

II.

Petitioner Cannot Present New Issues On Appeal Which Were Not Presented To The Appellate Court

Petitioner first raised the argument that the discovery rule applies to her case which she denied in her arguments to the Illinois circuit and appellate courts before the Illinois Supreme Court which denied the petition for a writ of certiorari. Effectively, the petitioner wishes to abandon her original continuing tort theory, argued in the Illinois circuit and appellate courts, and avail herself of this new theory.

In the U.S. Supreme Court, as it is in the Illinois Supreme Court, issues not argued in or presented to the appellate court may not be argued in or presented to this Court for the first time. *Moore v. State of Illinois*, 408 U.S. 786, 92 S.Ct. 2562 (1972); *Beck v. Washington*, 369 U.S. 541, 82 S.Ct. 1575 (1962); *Hammond v. North American Asbestos Corp.*, 97 Ill.2d 195, 454 N.E.2d 210 (1983); *Clore v. Fredman*, 59 Ill.2d 20, 319 N.E.2d 18 (1974); *Peo. ex rel. Dept. of Transp. v. Walliser*, 258 Ill.App.3d 782, 629 N.E.2d 1189 (3d Dist. 1994). Questions not

called to the attention of the appellate court are thereby waived for purposes of further appeal to the Supreme Court. *Walliser, supra*; *Meyers v. Kissner*, 149 Ill.2d 1, 594 N.E.2d 336 (1992).

In the instant case, defendant-respondent argued the discovery rule in its motion for summary judgment in the circuit court. The plaintiff-petitioner argued against the application of the discovery rule and asked the court to apply instead the continuing tort theory. The circuit court (as well as the Illinois Appellate Court) had all the facts before it in determining the outcome of this litigation including the facts which petitioner now argues support her petition for appeal to this Court. The circuit court ruled against the plaintiff-petitioner and applied the discovery rule in granting summary judgment for the defendant-respondent. Subsequently, the plaintiff-petitioner sought to have the appellate court reverse the circuit court's ruling based on the same continuing tort theory arguments. The appellate court affirmed the circuit court's ruling holding that the trial court was correct in applying the discovery rule and that the continuing tort theory did not apply to this case. Consequently, this Honorable Court should deny the petition for writ of certiorari.

III.

The Illinois Appellate Court Was Not Required To Pass On The Issue Of The Trial Court's Determination Under The Discovery Rule

The petitioner incorrectly "argues" in her statement of the case that the Illinois Appellate Court improperly determined when she knew or reasonably should have

known of her injury. She further argues that the Illinois Appellate Court placed excessive emphasis on the continuing tort theory thereby failing to "evoke" [sic] the discovery rule.

First, the plaintiff-petitioner's appeal to the Illinois Appellate Court merely sought to have the court determine that the continuing tort theory should apply to her case as opposed to the discovery rule which the trial court relied upon in granting summary judgment. The plaintiff-petitioner at either the trial or appellate levels that the discovery rule was not applied correctly. In fact, the Illinois Appellate Court disposed of that issue:

> In the instant matter, the facts are not in question. The plaintiff does not dispute that she knew the defendant had wrongfully caused her injuries for more than two years before filing her complaint. *Bowden v. Public Building Commission of Chicago*, No. 1-94-3223 (Ill.App.Ct. 1 Dist. Jan. 23, 1996).

At that point, the Illinois Appellate Court turned to the only issue presented, i.e., the plaintiff-petitioner's continuing tort theory.

The Illinois Appellate Court affirmed the trial court holding that the continuing tort theory did not apply and that the trial court was correct in applying the discovery rule to the undisputed facts regarding where she knew of her injury and its allegedly wrongful causation. It is axiomatic to say that since the question was not presented on appeal, the Illinois Appellate Court was not required to pass on the issue of *how* the trial court applied the discovery rule.

CONCLUSION

Therefore, respondent, PUBLIC BUILDING COMMISSION OF CHICAGO, respectfully requests that petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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